Supreme Court, U.S.
FILED
JUL 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AXIS, S.p.A.,

Petitioner,

—v.—

MICAFIL, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does an Italian manufacturer of machines, foreclosed from selling in the United States market because it lacks a necessary patent, suffer antitrust injury when a patent holder allegedly lessens competition in the market by acquiring one of two of its available licensees, even though the Italian company suffered no loss from the alleged lessening of domestic competition?

RULE 28.1 LISTING

Respondent Micafil, Inc., a Delaware corporation, is a wholly owned subsidiary of ASEA Brown Boveri, Inc., a Delaware corporation, which is a wholly owned subsidiary of ABB ASEA Brown Boveri, Ltd., a Swiss corporation, 50% of the stock of which is owned, equally, by two publicly traded corporations, ASEA AB, a Swedish corporation, and BBC Brown, Boveri & Co., Ltd., a Swiss corporation. Respondent is affiliated with Micafil, A.G., a Swiss corporation, which is an indirect wholly-owned subsidiary of ABB ASEA Brown Boveri, Ltd., the Swiss corporation referred to above.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Micafil, Inc. respectfully requests this Court to deny the Petition For Writ of Certiorari seeking to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

A Writ of Certiorari should be denied since the Court of Appeals' decision is consistent with decisions of this Court, does not conflict with decisions of other Circuits and does not raise an issue of general effect or application.

This case involves an Italian manufacturer of machinery, foreclosed from selling in the United States because it lacks a necessary patent license. It seeks to recover treble antitrust damages from a patent holder which acquired one of its own two domestic licensees.

Both the District Court and the Court of Appeals held that the Italian manufacturer, petitioner Axis, S.p.A., had not suffered "antitrust injury" and could not assert an antitrust claim. Both courts reasoned that the injury which Axis complains of—its inability to sell machines in the United States—was attributable to the patent barrier, and not to any lessening of competition within the United States, the alleged violation of the antitrust laws.

The courts below observed that prior to 1985 there were three foreign manufacturers of machines subject to the patents (armature winding machines), Axis, Micafil, A.G. (an affiliate of Respondent Micafil, Inc.) and a Japanese manufacturer, Odawara. All were foreclosed from the American market by the patent barrier. Micafil and Odawara entered the United States market by making acquisitions of patent holders or licensees, which Axis also had the opportunity to do.

In holding that under these circumstances Axis had not suffered "antitrust injury", the Court of Appeals, as well as the District Court, followed this Court's teachings in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), that under Clayton Act §§ 4 and 16 a putative antitrust plaintiff must show that his injury was "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." 429 U.S. at 489; 479 U.S. at 109. Under *Brunswick* and *Cargill*, Axis' injury did not flow "from that which [made Respondent's] acts unlawful"—the lessening of competition within the United States—but from the patent barrier itself.

In seeking Certiorari, Axis essentially argues that the Court of Appeals erred in its interpretation of *Brunswick* and *Cargill*, positing instead an excruciatingly narrow reading of those deci-

sions. In doing so, Petitioner misconstrues the proper purpose of a petition for writ of certiorari, which is not to seek the correction of lower courts' errors.

Axis also urges in this Court (as it did below) a case which is significantly different from that presented in the complaint, and on that basis claims that it presents matters of great general import meriting this Court's review. While for present purposes the facts alleged in the complaint must be taken as true (the Complaint having been dismissed for failure to state a claim), Axis goes far beyond those allegations in attempting to make a case in this Court.

The complaint alleges that prior to 1985, there were three foreign manufacturers of armature winding machines, all foreclosed from the United States market because of their lack of U.S. armature winding machine patents or licenses: Axis, Micafil, A.G., and Odawara. At that time, there were four manufacturers of armature winding machines in the United States under the patent umbrella: Globe Tool & Engineering Company ("Globe") and Possis Corporation ("Possis"), which had granted each other non-exclusive licenses to make armature winding machines with patented wire cutting methods, and two licensees under Possis' patents, Ott-A-Matic, Inc. ("Ott") and Mechaneer, Inc. ("Mechaneer"). Prior to 1985, all three foreign manufacturers had attempted to obtain licenses from Possis, and all had been rebuffed.

In July 1985, Respondent Micafil, Inc. purchased substantially all of the assets of the motor equipment division of Possis, which included the various patents and patent licenses covering armature winding machines. Axis then learned that Respondent Micafil was attempting to purchase Mechaneer, and its president approached Mechaneer to determine whether it was available for purchase. Mechaneer's principals refused to discuss a purchase by Axis since negotiations with Micafil had progressed to the point that a sale was likely. In its complaint, Axis alleges that it was willing to pay a price for Mechaneer equal to that which Micafil was offering, but Axis does not allege that it

made an offer to purchase Mechaneer, at that price or a greater one.

In September 1985, Micafil purchased substantially all of the assets of Mechaneer for approximately $1 million, including the armature winding machine patent licenses. Axis claims that Possis' share of the American market for armature winding machines was approximately 40% and that Mechaneer's share of the market was at least 10%.

Subsequently, Odawara entered the United States market for armature winding machines by purchasing Ott. There is no allegation that Axis attempted to acquire Ott or attempted to acquire the other patent holder, Globe.

Axis commenced this action in July 1987 alleging that Micafil had violated Sherman Act, § 1, 15 U.S.C. § 1, and Clayton Act, § 7, 15 U.S.C. § 18, by acquiring Mechaneer because the acquisition brought about a substantial reduction of competition within the United States market for armature winding machines. Axis alleged that Micafil's acquisition of Mechaneer had raised substantially the "barriers to entry" into the American market for all potential manufacturers of armature winding machines, particularly Axis, and had prevented Axis' entry into the market. Axis further alleged (Complaint, ¶ 20) that "the Possis patents now owned by Micafil" are "[t]the only thing[s] preventing" Axis' entry into the United States market. Axis asserted that but for Micafil's acquisition of Mechaneer Axis would have acquired Mechaneer, a patent license and the right to sell its machines in the United States. While Axis states in its Petition (Pet. at 5, ftnt. 1) that "Micafil ensured that Axis could not enter by refusing to grant a license to Axis under the Possis patents which it had previously acquired," the complaint contains no such allegation.

Similarly, the Complaint does not allege, as the Petition suggests (p. 5), that Micafil's acquisition of Mechaneer violated § 7 of the Clayton Act because it eliminated "the substantial increase in competition that Axis would have brought to the U.S. market." (Pet. at 5) Had Axis acquired Mechaneer, of course, it would not have *increased* competition, for there

would have remained four manufacturers in the United States market, the same number there had been prior to Micafil's acquisition of Mechaneer.

Micafil moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim on the grounds that, even if its acquisition of Mechaneer had violated the antitrust laws, Axis had suffered no "antitrust injury" as a result, under this Court's decisions in *Brunswick* and *Cargill.* Clayton Act §§ 4 and 16, 15 U.S.C. §§ 15, 26. Specifically, Micafil argued that Axis' "injury"—its exclusion from the United States market—was due to the existence of the patent barrier, as Axis admitted in its complaint, and did not "flow[s] from that which makes defendants' acts unlawful.", *Brunswick*, 429 U.S. at 489. The District Court agreed, dismissing the complaint for failure to allege antitrust injury, and the Court of Appeals affirmed on the same grounds.

While Axis in its Petition states that the Court of Appeals affirmed dismissal of the complaint "in a brief conclusion relying on *dictum*," (Pet. at 7) the Court of Appeals' decision carefully analyzed the complaint, this Court's decisions, its own and those of the other Circuits, giving close attention to Axis' arguments. Indeed, all the arguments which Axis raises here were resolved by the Court of Appeals.

Noting that Axis admits in its complaint that the patent barrier foreclosed its entry into the market, the Court of Appeals ruled that Axis' exclusion from the market did not arise because Micafil's acquisition of Mechaneer "brought about a substantial reduction of competition *in the market.*" 870 F.2d at 1106. (Emphasis supplied) Thus, the Court of Appeals found that Axis' exclusion from the market did not "flow" from "that which made the defendants' acts unlawful," as required by *Brunswick* and *Cargill.*

The litmus test applied by the Court below to determine whether the injury "flowed" from "that which made the defendants' acts unlawful" was whether Axis' injury would have been suffered irrespective of the illegality of the challenged activity. Here, Axis' injury arose because it lacked patents, not

because of the alleged illegality. ". . . Axis would have suffered the same injury if Mechaneer had remained in business or if some entity other than Micafil had purchased Mechaneer." 870 F.2d at 1111. Thus, Axis' alleged injury "did not 'flow from' the element of the acquisition that made it unlawful." 870 F.2d at 1112. In so holding, the Court of Appeals expressly relied on this Court's holdings and reasoning in *Brunswick* and *Cargill*, and decisions reaching the same result in analogous cases by the Third Circuit, in *Alberta Gas Chemicals Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235 (3rd Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 2830 (1988), and the Fifth Circuit, in *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984).

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision faithfully followed this Court's teachings in *Brunswick* and *Cargill* and is fully consonant with the decisions of every other Circuit which has addressed the requirement of "antitrust injury." Even more, although the petition fails to reveal it, the rule applied and reasoning of the Sixth Circuit below are identical with those in similar cases of the Third, Fifth and Eighth Circuits. Indeed, Axis is so bereft of authority that, in its attempt to show a conflict between the Circuits, it has turned to a pre-*Brunswick* case, which did not even address "antitrust injury," and an inapposite decision of the Seventh Circuit.

Nor is this case one of broad applicability which has an effect far beyond the immediate parties. No "new rule" was created by the Court below, as Axis contends (Pet. at 8). Indeed, just as Axis' argument that the Court of Appeals erred in construing *Brunswick* rests upon an unreasonably narrow reading of that case, its attempt to make this case one of sufficient universiality to merit this Court's review bends the facts of the case and the decision of the Court of Appeals beyond recognition.

This is not a case "where there is a substantial decrease in competition and the plaintiff is one whose injury is the exclu-

sion from the market as a direct result of the acquisition." (Pet. at 8). This is a case where an Italian company, foreclosed from the market because of a patent barrier, remained in that position after one of two available patent licensees in the market was acquired, allegedly in violation of the antitrust laws. The exclusion from the market pre-existed the challenged acquisition of one of the patent licensees, and also continued after the other patent licensee—which Axis could have acquired and by that entered the market—was acquired by Axis' other competitor, Odawara. The Court of Appeals' holding manifestly has not "created a rule of antitrust injury so narrow that it could have an adverse impact on most antitrust actions." (Pet. at 8). To the contrary, it is self-evident that the very uniqueness of these facts make this case an unlikely candidate for general application, and thus an inappropriate one for this Court's review.

I. THE COURT OF APPEALS' DECISION IS IN HARMONY WITH THIS COURT'S DECISIONS IN *BRUNSWICK, CARGILL* AND *McCREADY*

The foundation of the Court of Appeals' decision was this Court's rule in *Brunswick* that a putative private antitrust plaintiff must plead and prove "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." (emphasis in original) 429 U.S. at 489. The injury to plaintiffs in *Brunswick* may have been caused by the continued existence of the failing bowling alleys, but it did not "flow from" the lessening of competition which made the failing bowling alleys' acquisition by the dominant Brunswick unlawful under Section 7 of the Clayton Act. As this Court noted, the plaintiffs "would have suffered the identical 'loss'—but no compensable injury—had the acquired centers instead obtained refinancing or been purchased by 'shallow pocket' parents . . . ." 429 U.S. at 487.

Thus, the Court of Appeals' decision below, finding that Axis has not suffered antitrust injury here is not merely consistent with this Court's reasoning in *Brunswick*—it is precisely

the same—"Axis would have suffered the same injury if Mechaneer had remained in the business or if some entity other than Micafil had purchased Mechaneer." 870 F.2d at 1111 (Pet. 14a). Certainly, the Court of Appeals created no new rule or reasoning.

Axis' narrow reading and its attempt to reduce *Brunswick* to the self-evident proposition that the antitrust laws do not protect a competitor from increased competition (Pet. at 8), ignore entirely this Court's analysis and presumes that this Court would have granted certiorari and rendered its decision only to restate the obvious. There is nothing in *Cargill* or *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) which supports Axis' argument that *Brunswick* was so limited. To the contrary, this Court in *Cargill began* its analysis by reaffirming *Brunswick* and its rule that an antitrust injury must be one "that flows from that which makes the defendants' acts unlawful." 479 U.S. at 109.

Axis' reference (Pet. at 11) to this Court's statement in *Cargill* (479 U.S. at 121) that it declined the Government's *amicus curiae* request to adopt a "*per se*" rule "denying competitors standing to challenge acquisitions on the basis of predatory pricing theories," does not aid Axis in its position that it has suffered antitrust injury. Even if predatory conduct were to be treated differently, that has no bearing here. Axis' complaint makes no allegation of any predatory practice by Micafil.

The Court of Appeals decision is consonant as well with *McCready*. This Court stated there ". . . we agree with petitioners that the relationship between the claimed injury and that which is unlawful in the defendant's conduct, as analyzed in *Brunswick*, is one factor to be considered in determining the redressability of a particular form of injury under § 4." 457 U.S. at 483, n.19. That this Court found the *McCready* plaintiff had suffered antitrust injury does not advance Axis' argument. Unlike Axis, Ms. McCready was in the market as a consumer whose choice of professionals to render service had been unlawfully limited by an agreement to restrain trade.

Unlike Axis, her injury "flowed from that which made the defendants' acts unlawful."

Axis' statement (Pet. at 12) that the Court of Appeals "ignored" *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964), *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973) and *United States v. Marine Bancorporation*, 418 U.S. 602 (1974), is misplaced. None of those cases even suggested that a private party, outside the market, can bring a private antitrust action for a lessening of competition within the market or for the foreclosure of an increase of competition within the market. The cases cited were actions by the Government challenging mergers which lessened competition in violation of Clayton Act § 7, they pre-dated *Brunswick* and did not address antitrust injury or standing.

II. THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS

Every Circuit which has addressed the question of "antitrust injury" in a factually pertinent case has come to the same conclusion as did the Court of Appeals for the Sixth Circuit in this case. The "conflict" which Axis claims to find among the circuits is simply non-existent.

In *Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235 (3d Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 2830 (1988), a case expressly relied on by the Court of Appeals below but passed over in silence by Axis, the Third Circuit affirmed the dismissal of a claim, where as here, plaintiff's injury would have occurred irrespective of the illegality of the challenged acquisition. There, a producer of methanol challenged the acquisition of Conoco by Du Pont, the largest producer of methanol in the United States, alleging that the acquisition violated Clayton Act Section 7 because it reduced competition in the sale of methanol. Plaintiff claimed two injuries. First, after Du Pont acquired Conoco, Conoco no longer purchased methanol from plaintiff and plaintiff lost the profits from those lost sales. Second, plaintiff alleged that after

the acquisition Conoco abandoned plans to stimulate the demand for methanol, pending completion of its own methanol plant, by purchasing methanol from plaintiff and others and selling it on the merchant market. Plaintiff claimed that Conoco's abandonment of the program to generate additional demand for methanol caused plaintiff to lose the methanol sales that that demand would have created.

The Third Circuit, following *Brunswick*, found that plaintiff had not suffered an antitrust injury because its injuries did not flow from "that which makes the defendants' acts unlawful." 826 F.2d at 1241. In reasoning identical to the Court of Appeals in this case, the Third Circuit explained, "That is clear because the same harm would have occurred had any acquirer decided to curtail Conoco's production and marketing plans. For example, a non-methanol producing company whose merger would not pose antitrust problems, . . ." 826 F.2d at 1241.

The Fifth Circuit, in *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984), held that a soft drink wholesaler and distributor did not suffer antitrust injury when a bottler it was seeking to acquire was acquired instead by a competitor, allegedly in violation of Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act. As Axis does here, plaintiff there claimed "an antitrust injury because it was prevented from acquiring [the target], an acquisition which would have improved its business position and increased its profits." 725 F.2d at 304. And just as the Sixth Circuit below rejected that argument by Axis here, the Fifth Circuit in *Bayou Bottling* stated, "this assertion of antitrust injury is foreclosed by the holding in *Brunswick*." 725 F.2d at 304. The Fifth Circuit's reasoning and application of *Brunswick* were the same as the Sixth Circuit's here: "Bayou would have suffered the identical loss of sales, and economies of scale if [the target] had retained its operation or if he had been sold to a third party." 725 F.2d at 304.

And recently, the Eighth Circuit, in *State of South Dakota v. Kansas City Southern Industries, Inc.*, 1989-1 Trade Reg. Rep. (CCH) ¶ 68,635 (8th Cir. June 29, 1989), held that the State of

South Dakota had not suffered antitrust injury and had no standing to challenge a conspiracy among railroads to drive out of business a coal slurry pipeline with which the State had a water supply contract. The injury claimed was the loss of profit on the water supply contract which the pipeline had to terminate because of the conspiracy.

The Eighth Circuit found that South Dakota was not an actual participant in the coal transportation market, just as Axis was not an actual participant in the United States armature winding machine market. *Id.* at 61,352. Interpreting *Brunswick* in exactly the same fashion as the Sixth Circuit did in this case, the Eighth Circuit held that while South Dakota may have suffered injury by defendants' anti-competitive actions, South Dakota's "injuries did not result from the *anti-competitive nature* of these practices." *Id.* at 61,353 (emphasis supplied). The Eighth Circuit's reasoning also was exactly the same as the reasoning of all other Circuits on the question. "The loss of future revenues clearly flowed from the cancellation of the contract rather than from injury to competition in the market in which it was involved. [citations omitted]. It is evident that South Dakota would have suffered an identical loss in the event that the [defendant] railroads had done nothing and [the pipeline] had simply decided to terminate the SDCD/ETSI contract for some other reason." *Id.* at 61,353.

In short, far from there being a conflict between the Circuits on the issue presented in this case, they have unanimously applied the same reasoning, and interpreted *Brunswick* in precisely the same way, as did the Sixth Circuit here.

Axis' authority to support its contention that there is a conflict among the Circuits is the 1975 pre-*Brunswick* decision in *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976) and the Seventh Circuit's factually inapposite decision in *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986). *Helix* did not even address standing or "antitrust injury", but accepted a "but for" causation theory—a theory expressly rejected in *Brunswick*. (". . . [an antitrust plaintiff] must prove more than

injury causally linked to an illegal presence in the market." 429 U.S. at 489).

In *Fishman*, a purchaser of the Chicago Bulls professional basketball team could not obtain League approval of the sale because of defendants' predatorily motivated refusal to deal which denied plaintiff use of an arena. Unlike Axis here, who was free to compete at all times for the purchase of Mechaneer and Ott (and thus enter the United States market) the predatory efforts of the *Fishman* defendants "effectively cut-off all competition for the acquisition of the Bulls franchise and injured plaintiffs as a result." 807 F.2d at 533. There is not the slightest suggestion that a plaintiff who could freely compete for entry into the market, and who is not the object of predatory practices, would suffer antitrust injury.

III. THE COURT OF APPEALS' DECISION, CONSONANT WITH EXISTING LAW, DOES NOT PRESENT AN IMPORTANT ISSUE REQUIRING THIS COURT'S REVIEW

While admittedly important to the parties, it is respectfully submitted that the issue of whether Axis has suffered "antitrust injury", as defined by three decisions of this Court, and by the uniform interpretation of those decisions by the Third, Fifth, Sixth, and Eighth Circuits, does not present an issue of sufficient general effect or application to merit a fourth pronouncement by this Court. Axis does not urge that the *Brunswick* rule ought to be reversed or modified. To the contrary, Axis does not question the rule itself (Pet. at 9-10), but only argues that the Court of Appeals misinterpreted *Brunswick* and "created" a new, narrow rule.

The correctness or erroneousness of the Court of Appeals, of course, is an insufficient ground upon which to seek this Court's exercise of its certiorari jurisdiction. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). However, the Sixth Circuit did not create a new rule in this case, and that is demonstrated beyond question by the congruency of its reasoning and result with not only *Brunswick* and *Cargill*, but with the other Circuits' deci-

sions in *Alberta Gas, Bayou Bottling* and *Kansas City Southern Industries*. There is, in short, no novel or important principle of law and no unsettled points of great public interest in this case.

Certainly such an issue is not raised by Axis' argument (Pet. 14-16) that it is "the most appropriate plaintiff" to challenge Micafil's acquisition of Mechaneer. Whether a party is an "appropriate" antitrust plaintiff is a question of antitrust standing, and, as such, it was not reached by the Court of Appeals because Axis has not suffered antitrust injury. As this Court said in *Cargill*, "a showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4 because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons." 479 U.S. at 110 n.5.

Faced with a clear rule in *Brunswick*, consistently applied by the Courts of Appeal to achieve the same results, Axis' argument boils down to the contention that the Court below required that Axis, "must show that the same 'injury' could not have resulted from any set of possible facts not involving an antitrust violation." (Pet. at 17). That is not what the Court of Appeals required, and it is a gross misstatement of the decision below. The Court of Appeals required no more than what is required in *Brunswick*—that a putative private antitrust plaintiff show that the injury it suffered was an injury which was attributable to the illegality of the defendants' acts, and not merely traceable to the acts themselves.

Axis' injury here occurred *irrespective* of the reduction of competition within the United States in the sale of armature winding machines. That does not mean that another party, which may have been affected by the alleged reduction in competition, could not show antitrust injury. As the Court of Appeals recognized (870 F.2d at 1111-1112) a consumer, forced to pay more for armature winding machines because of a reduction of competition in the sales of such machines, might have such an injury, for that injury would "flow from that which made the defendants' acts unlawful." The Court of Appeals

required no more than *Brunswick* required, and as such did no more than faithfully follow this Court's teaching in *Brunswick*.

CONCLUSION

The Court of Appeals properly followed and applied *Brunswick* and *Cargill*, and its decision agrees with that of every other Circuit which has applied *Brunswick* and *Cargill* in factually similar cases. No "new rule" of antitrust injury was created, only faithful application of the existing rule.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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